FILE COPY.

Office Supreme Court, U. S.
FILED.
FEB 26 1907
JAMES H. McKENNEY,
CLERK.

No. 220.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

DAVIDSON STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

DAVIDSON STEAMSHIP COMPANY, PLAINTIFF in error, *v.* THE UNITED STATES. } No. 220.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

This suit was brought by the Government in the United States Circuit Court for the District of Minnesota to recover damages to an extension of the easterly breakwater at the entrance to Two Harbors at Agate Bay on Lake Superior, resulting from a collision with said breakwater by the steamer *Shenandoah*, owned by the plaintiff in error. The case was tried to a jury and a verdict returned in favor of the Government for the full amount of the damages sustained, viz, $4,012.50. The steamship company thereupon took the case to the Circuit Court of Appeals for the Eighth Circuit, and on the 7th of November, 1905, that

court affirmed the judgment of the court below. The case is before this court on a writ of error to the Circuit Court of Appeals for the Eighth Circuit.

THE QUESTIONS PRESENTED.

The record contains thirty-six assignments of error, many of which need not be considered for the reason that counsel for the plaintiff in error rely upon and discuss but two propositions in their brief, which are as follows:

1. That the master of the *Shenandoah* was not guilty of negligence in failing and neglecting to ascertain the conditions at the entrance of the harbor of Agate Bay before attempting to enter it on the night of the 24th of July, 1901.

2. That even if the master of the *Shenandoah* was guilty of negligence in failing and neglecting to inform himself as to the existence of the improvement, the Government through its officers and agents was guilty of contributory negligence in failing to maintain a red light on the new extension to the old breakwater, which was then under process of construction.

Inasmuch as counsel for the plaintiff in error have elected to rely upon these two questions for a reversal of this judgment, we shall confine our discussion to these two propositions.

I.

The Negligence of the Master of the Shenandoah.

The testimony upon the trial of this case shows very clearly that the master of the *Shenandoah* had failed and neglected to inform himself as to the conditions then existing at the entrance to Two Harbors, Minn., which an ordinarily prudent and cautious mariner would have done under similar circumstances. The Government issued notices and bulletins concerning the extension to the breakwater at Two Harbors, and prepared and issued a chart which showed the precise location of the new breakwater. These notices, bulletins, and chart will now be taken up and considered in the order in which they were issued.

On July 29, 1899, a pamphlet was issued by the Hydrographic Office of the Navy Department, entitled "Notice to Mariners, published weekly by the Hydrographic Office," No. 30, Washington, D. C. This pamphlet was marked "Plaintiff's Exhibit B," and the portion of said exhibit particularly referred to and offered in evidence is as follows:

> (703) Lake Superior — Minnesota — Two Harbors — Information concerning breakwater — Depth alongside docks — The following information concerning the Government breakwaters at Two Harbors was obtained from Mr. J. H. Darling, U. S. assistant engineer:
>
> The breakwater at the west side of the

harbor is built to the length of 750 feet, 150 feet to be added and finished in the year 1900.

The breakwater at the east side of the harbor is built to the length of 750 feet; the proposed extension of 250 feet in the same direction has been abandoned and in its stead an extension at an angle of 45 degrees southward 300 feet in length is proposed, making the entire length of this (eastern) breakwater 1,050 feet. This is also to be finished in the year 1900.

Information has been received from Mr. R. Angst, chief engineer of the Duluth and Iron Range Railway, that the least water on both sides of all the ore docks in Agate Bay, Two Harbors, is 20 feet, 18 feet on both sides of the merchandise dock, and the same depth on the southwest side of the coal dock. (Rec., p. 175.)

On August 11, 1900, the Hydrographic Office of the Navy Department issued an octavo pamphlet entitled "Notice to Mariners, published weekly by the Hydrographic Office, No. 32, Washington, D. C., August 11, 1900," marked "Plaintiff's Exhibit C."

The portion of this exhibit particularly referred to and offered in evidence is as follows:

Lake Superior—Minnesota—Two Harbors breakwater—Caution. Referring to Notice to Mariners No. 30 (703), of 1899, further information has been received that the work

on the extension of the breakwater piers at Two Harbors has been actively carried on by the Government since the opening of navigation.

A communication from the contractor, dated July 31, 1900, states that the submarine work on the extension of the east breakwater has now advanced so far as to leave only 16 feet of water over the embankment. Such a spot is located about 200 feet from the end of the old breakwater.

Masters of vessels are therefore cautioned on entering the harbor to give the old breakwater a berth of 300 feet and not to round the east breakwater close on board, as formerly, on account of this danger.

(Rec., p. 176.)

Frank Heinrich, a Government witness, and a nautical expert for the Navy Department, in charge of the United States hydrographic office in Duluth, who was called as a witness in behalf of the Government, testified that the above bulletin was promptly mailed to masters of steamships and sailing vessels in the Duluth district, and that a copy had been mailed to Captain McAvoy, of the steamship *Shenandoah*, at Detroit, Mich., care of the marine post-office. (Rec., p. 43.)

Maj. Walter L. Fisk, a witness for the Government, testified (Rec., p. 73) that on March 6, 1901, the War Department prepared and issued a chart of Agate and Burlington bays (see Government's Exhibit A, record, p. 183), which designated the

old pier on the east side of Two Harbors with a fixed red light at the west end of the pier, and indicated the extension by dotted lines extending southwesterly at an angle of 45 degrees; that charts of this character are published by authority of an act of Congress as aids to navigation; that the chart in question had been placed on sale at the headquarters of the lake survey at Detroit, and also on sale at the office of the canal at Sault Ste. Marie, Buffalo, Duluth, Chicago, Milwaukee, Cleveland, and Oswego, where it could be had for the price of 5 cents.

On April 1, 1901, a bulletin (Government's Exhibit D, record, pp. 91, 177) was issued by the Chief of Engineers of the United States Army at Washington, which bulletin was intended to supplement the information given upon the charts of the Great Lakes, and also stated where said bulletin could be had upon application. On page 5 of this bulletin appears the following:

> Agate Bay, Minnesota (Two Harbors). Before improvement, fully exposed to the winds from southeast and to heavy swells from northeast and southwest winds. January, 1901.—The west breakwater has been completed and is 900 feet long. East breakwater is 750 feet long, and during next summer will be extended 300 feet in a southwesterly direction, the riprap embankment being already in place under water. *Vessels should keep 300 feet away from the outer end of the east breakwater.* Vessels can remain

in harbor during severe storms. Charts: Lake Superior, No. 3; Lake Superior; Agate and Burlington bays.

This bulletin was obtainable upon application from the following United States engineers' offices: Duluth, Minn., 519 Providence Building; Milwaukee, Wis., custom-house; Chicago, Ill., 1637 Indiana avenue; Grand Rapids, Mich., 57 Park street; Detroit, Mich., Canpau Building; Cleveland, Ohio, Hickox Building, 185 Euclid avenue; Buffalo, N. Y., 540 Federal Building; Oswego, N. Y.. Second National Bank Building.

Captain McAvoy, of the *Shenandoah*, on cross-examination by the Government (Rec., p. 99), testified that all mail addressed to him was delivered to him personally when brought to the vessel; that he had received bulletins and notices to mariners, but disclaimed any knowledge of having received any notices concerning the extension to the breakwater at Two Harbors. He further stated in his testimony on cross-examination (Rec., p. 103) that he paid little attention to notices of this character.

His testimony on this point is as follows:

Q. As a sailor, what do you depend on for information concerning the changes in harbors?

A. Do you say concerning a change in the harbor?

Q. Yes; what information do you depend on?

A. Well, I most generally depend on observation and what I hear from others—other masters that have been in the harbor ahead of me.

Q. You pay no attention whatever to the bulletins when they come in?

A. *Very little.*

Q. Very little?

A. Yes, sir.

Q. And you don't always get information from the masters of other vessels, as was the case in your entering the harbor of Two Harbors that night?

A. Oh, yes, sir; I have often got *information at different places.*

It will be observed from these notices and bulletins that the Government had taken the precaution to advise mariners that an extension to the breakwater on the east side of Two Harbors was under process of construction, and that they should give the old breakwater a berth of 300 feet.

Nitroglycerine Case, 15 Wall., 524, 536.

In this case one Parrot brought an action in the Circuit Court for the District of California against certain defendants who composed the firm of Wells, Fargo & Co., express carriers, to recover damages for injuries to certain buildings owned by him in the city of San Francisco, caused by the explosion of nitroglycerine in charge of the express company. Mr. Justice Field, in delivering the opinion of the court, said:

"Negligence" has been defined to be "the omission to do something which a reasonable

> man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon *any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.*

Railroad Company v. Jones, 95 U. S., 439, 441.

This was an action by one Jones against the Baltimore and Potomac Railroad Company to recover damages for an injury received on the road of the company. Judgment was rendered in his favor and the company brought the case to this court.

Mr. Justice Swayne, in delivering the opinion, gave the following definition of negligence:

> "Negligence" is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may

lie in omission or commission. The duty is dictated in a measure by the exigencies of the occasion.

***Grand Trunk Railway Company* v. *Ives*, 144 U. S., 408, 417.**

This case was an action by one Ives, as administrator of an estate, against the Grand Trunk Railway Company of Canada, a Canadian corporation operating a line of railroad in Michigan, to recover damages for the alleged wrongful and negligent killing of the plaintiff's intestate by the railway company at a street crossing in the city of Detroit. It was commenced in the State court, and was afterwards removed into the Federal court on the ground of diverse citizenship. The court said:

> There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and can not be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings

of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court. (*Railroad Co.* v. *Pollard*, 22 Wall., 341; *Delaware, &c., Railroad* v. *Converse*, 139 U. S., 469; *Thompson* v. *Flint, &c., Railway*, 57 Michigan, 300; *Lake Shore, &c., Railway* v. *Miller*, 25 Michigan, 274; *Railway* v. *Van Steinberg*, 17 Michigan, 99, 122; *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass., 208, 212; *Marietta, &c., Railroad Co.* v. *Picksley*, 24 Ohio St., 654; *Pennsylvania Railroad* v. *Ogier*, 35 Pa. St., 60; *Robinson* v. *Cone*, 22 Vermont, 213; *Jamison* v. *San Jose, &c., Railroad*, 55 California, 593; Redfield on Railways (5th ed.), sec. 133, ¶ 2; 16 Am. and Eng. Enc. Law, Tit. "Negligence," 402.)

This court has also held that when a steamer is about to enter a harbor great caution is required. In the case of *Culbertson* v. *Shaw et al.* (18 Howard, 584, 587), Mr. Justice McLean, in delivering the opinion of the court, said:

When a steamer is about to enter a harbor great caution is required. There being no

> usage as to an open way, the vigilance is thrown upon the entering vessel. Ordinary care, under such circumstances, will not excuse a steamer for a wrong done.

Can it be said that Captain McAvoy took those precautions against accident which a careful and prudent mariner would have taken under similar circumstances? Before leaving the port of Superior on the afternoon of the 24th of July, 1901, Captain McAvoy knew (for how long does not appear) that he must call at the port of Two Harbors to pick up the schooner *Paisley* for the purpose of towing her down the lake to Erie, Pa. At that time Captain McAvoy knew that he had not visited the port of Two Harbors for more than a year. He also knew that the Government was engaged in making improvements at various ports on the Great Lakes, and he knew or ought to have known that it was only possible for a mariner to become acquainted with the character and location of such improvements by personally visiting the ports where such improvements were being made, or by inspecting the latest charts and bulletins issued by the United States Government for the information of mariners, or through inquiry and report from mariners and other persons who had recently visited such ports. The improvement into which Captain McAvoy ran his ship, the *Shenandoah*, on the night of the 24th of July, 1901, was first called to the attention of mariners on July 29, 1899 (Government's Exhibit B), and

again on August 11, 1900 (Government's Exhibit C), by which last-named notice masters of vessels were cautioned on entering the harbor of Agate Bay to give the old breakwater a berth of 300 feet and not to round the east breakwater close on board as formerly on account of this danger. Again, on the 1st day of April, 1901, another bulletin was issued (Government's Exhibit D), warning vessels to keep 300 feet away from the outer end of the east breakwater. These notices had been mailed to Captain McAvoy at Detroit, but little, if any, attention was paid to them, according to Captain McAvoy's own testimony; that is, he paid very little attention to any of the bulletins which were sent to him giving information as to the location, character, and extent of Government improvements on the Great Lakes. In addition to this information a chart was published by the Government and issued on the 6th day of March, 1901 (Government's Exhibit A), showing the extent and character of this improvement to the east breakwater at Agate Bay.

Notwithstanding all this information which had been issued and published by the Government for the protection of mariners, Captain McAvoy left Superior Harbor on the afternoon of the 24th day of July, 1901, with the purpose of visiting the port of Two Harbors, where he knew that he would arrive late at night, without having taken the trouble to obtain a chart of Two Harbors, which had been issued at the opening of navigation on that

year, and without having, as he testified, paid any attention to the bulletins which had been issued, published, and mailed to him during the two preceding years for his information and protection. Nor does it appear that Captain McAvoy took the trouble to inquire from other mariners or persons who had visited the port of Two Harbors during that season as to whether any changes had taken place at that port since he had been there more than a year before. In other words, all the sources of information from which Captain McAvoy could have possibly derived any knowledge with respect to the conditions and obstructions, if any, at the entrance of Agate Bay, had been totally disregarded and he approached that harbor on a wild and boisterous night with a high sea running and attempted to enter the bay upon the assumption that no changes whatever had taken place and that the conditions were the same as when he last entered the harbor more than a year before.

This court has said that the master of a steamer is required to exercise great caution upon entering a harbor. Not only is this necessary, but we know, as a matter of common knowledge, that a prudent mariner will not attempt to enter a port in the night-time unless he is perfectly familiar, from comparatively recent inspection, of all the conditions and improvements at the entrance of such harbor. Captain McAvoy had practically closed his eyes to all information concerning this improvement at the entrance to Agate Bay. It is

true that he had had no occasion to call at this port for more than a year, but when the necessity for visiting this port arose, and that too in the night-time, he should have at least attempted to inform himself as to whether conditions at the entrance to the harbor had been changed. Captain McAvoy knew that harbor improvements on the Great Lakes were conducted under the supervision of the War Department, and he could easily have ascertained the conditions at the mouth of this harbor by telephoning the office of the engineers of the United States Army at Duluth. Furthermore, when Captain McAvoy received orders to call at Agate Bay, knowing that he had not been in that harbor for more than a year and that the chart which he had of Agate Bay was an old chart, and that he would be compelled to enter the harbor in the night-time, it was certainly his duty, as a prudent mariner, to obtain a chart of that bay which had been issued by the Government at the opening of navigation, or to make some inquiry at the office of the United States engineers or from other mariners as to present conditions at the entrance of that harbor. Had Captain McAvoy taken such precautions this accident unquestionably would have been avoided.

In order that the question as to whether Captain McAvoy was negligent may be brought home to us in a most forcible manner, let us suppose that on the night in question we had been passengers on board the *Shenandoah* on a voyage from Superior, in the State of Wisconsin, to Erie, Pa., and

that Captain McAvoy had attempted to enter Agate Bay with no more knowledge as to the then existing conditions at the mouth of that harbor than is disclosed by this record; that instead of simply damaging the breakwater in the manner complained of, the *Shenandoah* had gone down, though providentially all the passengers had been saved, would anyone of us have entertained the least possible doubt in his own mind as to the culpable negligence of Captain McAvoy? The mind is instinctively shocked by the mere thought or suggestion that a mariner having in his keeping the lives and property of other persons has performed his full and complete duty toward such persons and property when it is shown beyond question that such mariner has attempted to guide his ship in the dead of night into a harbor with which he is not familiar, and without having before him as an aid to navigation the most recent chart showing the location of obstructions at the mouth of such harbor. The negligence of Captain McAvoy, which was the primary and proximate cause of this injury, consisted in his failure to inform himself with respect to those matters which it was his duty as a navigator to know, viz, that the Government was and for a long time had been engaged in building an extension of 300 feet to the east breakwater at Agate Bay. If on the night of the 24th of July, 1901, Captain McAvoy had known this simple but important fact, notice of which had been duly published by the Government from time to time for a period of

more than two years, the *Shenandoah* would have entered the port of Two Harbors in safety as hundreds of other ships had entered it at all times of the day and night during the preceding four months of that season.

Captain McAvoy, in Navigating the Great Lakes as Master of the Steamship Shenandoah and in Entering the Ports along those Lakes as Occasion Required, was Acting in a Dual Capacity, viz, As an Ocean Pilot and as a Harbor Pilot.

There is a broad distinction between an ocean pilot, one who is compelled to direct the course of a ship mainly by compass reckoning and astronomical observations, and a river or harbor pilot who relies not so much upon the compass as upon his familiarity with the natural objects and lights along the river and harbors with which he is supposed to be familiar. Captain McAvoy, as navigating officer of the *Shenandoah*, acted as ocean pilot while navigating his ship by compass and reckoning on the broad waters of Lake Superior. He also acted as a harbor pilot when he assumed to navigate his ship into such ports as Duluth, Superior, the Soo, Erie, Buffalo, and Two Harbors. In the case of *Atlee* v. *Packet Company* (21 Wall., 389, 396), Mr. Justice Miller, in delivering the opinion of the court, said:

> The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter

case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality and is made aware of the dangers of such locality, if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently erected in the course of the river, as sand bars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be

> injured. * * * It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high.

When Captain McAvoy, therefore, assumed to act in the capacity of a harbor pilot in entering the port of Two Harbors on the night of the 24th of July, 1901, the law imposed upon him the duty of being acquainted and familiar with all the dangers that were permanently erected or in process of construction at the mouth of such harbor. As was said by this court in the case above cited, he was required to be constantly informed of changes occurring from time to time, and other objects newly presented against which his vessel might be injured. But notwithstanding this duty Captain McAvoy disregarded all sources of information through which he could have become acquainted with the conditions at the entrance of this harbor, and attempted to enter it on a dark and boisterous night upon the assumption that the conditions were the same as they had been when he last entered the harbor more than a year previous. It would seem that these facts *per se* are sufficient to establish the culpable negligence of Captain McAvoy on the night in question.

Captain McAvoy is brought within the rule exacting a very high order of ability in a pilot as announced by this court in Atlee v. Packett Company, supra, by reason of the fact that at the time of the accident he was a duly licensed pilot and master under the laws of the United States.

Section 4401 of the Revised Statutes contains, among other things, the following provisions:

> All coastwise seagoing vessels and *vessels navigating the Great Lakes* shall be subject to the navigation laws of the United States when navigating within the jurisdiction thereof. (The italics are mine.)

Section 4438 of the Revised Statutes makes it unlawful for any person to serve as a master, chief mate, engineer, or pilot of any steamer of over seven hundred tons who is not licensed by the Government. This section is as follows:

> The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters and chief mates of sail vessels of over seven hundred tons and all other vessels and barges of over one hundred tons burden carrying passengers for hire. It shall be unlawful to employ any person, *or for any person to serve, as a master*, chief mate, engineer, *or pilot* of any steamer, or as master or chief mate of any sail vessel of over seven hundred tons who is not licensed by the inspectors; and anyone vio-

lating this section shall be liable to a penalty of one hundred dollars for each offense. (The italics are mine.)

Under the following provisions of the Federal Statutes Captain McAvoy was entitled, if competent, to hold a license in a *dual capacity*, that is to say, *as a master and as a pilot:*

Laws of the United States relative to the licensing of masters and pilots.

SEC. 4439. (License of captain.) Whenever any person applies to be licensed as master of any steam vessel, or of a sail vessel of over seven hundred tons, the inspectors shall make diligent inquiry as to his character, and shall carefully examine the applicant as well as the proofs which he presents in support of his claim, and if they are satisfied that his capacity, experience, habits of life, and character are such as warrant the belief that he can safely be intrusted with the duties and responsibilities of the station for which he makes application, they shall grant him a license authorizing him to discharge such duties on any such vessel for the term of five years; but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this title applicable to him.

SEC. 4442. (License of pilot.) Whenever any person *claiming to be a skillful pilot* of

steam vessels offers himself for a license, the inspectors shall make diligent inquiry as to his character and merits, and if satisfied, from personal examination of the applicant, with the proof that he offers, that he possesses the requisite knowledge and skill and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license, but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this Title. (Italics are mine.)

SEC. 4443. (License of captain or mate as pilot.) Where the master or mate *is also pilot* of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face *that he is authorized to act in such double capacity*. (The italics are mine.)

The act of May 28, 1896, c. 255, 29 Stat., 188, contains the following provision:

SEC. 2. That all licenses issued to such officers (section 1 specifically mentions masters and pilots) shall be for a term of five years, but the holder of a license may have the same renewed for another five years at any time before its expiration.

Certain rules and regulations prescribed by the board of supervising inspectors of steam vessels, duly approved by the Secretary of the Treasury and having the force of law as provided in section 4405 of the Revised Statutes.

The general rules and regulations prescribed by the board of supervising inspectors of steam vessels, as amended and issued and published in the month of January, 1901, and in force at the time of the collision in controversy, contained, among other things, certain provisions relative to masters and pilots which are important as bearing upon the question as to whether Captain McAvoy was a *duly licensed pilot* at the time of the accident.

> 6. The navigation of every steamer above one hundred tons burden shall be under the control of a *first-class pilot*, and every such pilot shall be limited in his license to the particular service for which he is adapted. Special pilots may also be licensed for small steamers of all kinds locally employed. (General rules and regulations of the board of supervising inspectors of steam vessels of January, 1901, p. 63.)

It is further provided, on page 65 of the general rules and regulations above referred to, that—

> Whenever a master or mate *desires to act as pilot and furnishes the necessary evidence of his ability*, the local inspectors for the district where the license is issued shall indorse such pilot routes on the master's or mate's certificate.

these regulations had been in force for more than five years prior to 1901, as shown by the general rules and regulations prescribed by the board of supervising inspectors of steam vessels issued and published in the month of January, 1897.

We have cited these provisions of the Federal statutes relative to the licensing of masters and pilots and the rules and regulations of the board of supervising inspectors of steam vessels for the purpose of showing that in the absence of proof to the contrary *a presumption* arises that Captain McAvoy was at the time of the accident not only *a duly licensed master*, but also a duly licensed *first-class pilot* under the laws of the United States and the rules and regulations of the board of supervising inspectors of steam vessels.

It is conceded that at the time of the accident Captain McAvoy was the master of the steamship *Shenandoah*. It will also be conceded that he was *acting as the pilot* of that ship at the time the collision occurred. He himself testified that he was in the pilot house at the wheel in charge of the navigation of the ship at the time of the collision. It does not appear from the evidence that there was any other officer on board the *Shenandoah* who was a licensed pilot. Section 4438 of the Revised Statutes, above quoted, declares that it shall be unlawful for any person to serve as a *master*, chief mate, engineer or *pilot* of any steamer of over seven hundred tons burden who is not licensed by the inspectors. Sections 4439 and 4433 of the Revised

statutes, above quoted, provide that where the master of a vessel is also the pilot that he shall not be required to hold two licenses to perform such duties, but that the license shall state on its face that he is authorized to act in *such dual capacity*.

The regulations above quoted are even more explicit. By the first of these regulations the navigation of the steamship *Shenandoah* was required to be *under the control of a first-class pilot*. The second of these regulations, above quoted, clearly contemplates that whenever a master desires *to act as pilot*, which was the case with respect to Captain McAvoy, *and furnishes the necessary evidence of his ability*, the local inspectors for the district in which his license was issued shall indorse such pilot routes on the master's certificate. We, therefore, have a case in which the master, John McAvoy, *was acting as the pilot* of his vessel on the night in question, and for aught that appears from this record always had acted as the pilot of the *Shenandoah*. Our contention is that it will be *presumed*, in the absence of any proof to the contrary, that he was duly licensed by the Government to act in *such dual capacity*, to wit, as a master and as a first-class pilot. We submit the following authorities in support of this proposition:

Butler v. Boston Steamship Company, 130 U. S., 527, 554.

> The question then arises whether the defense made by the appellants in the cause of limited liability instituted by the owners of the steamship is a good defense, as set

forth in the pleadings and the agreed statement of facts. The main allegation relied on by the appellants to bring the case within the steamboat inspection law is, that the second mate was in charge of the vessel at the time of the accident, and that he was not a licensed pilot. The libellant owners deny this, and claim that it is immaterial if true. There is no proof on the subject. But suppose it were admitted to be true, how could the owners have prevented the second mate from being in charge? By virtue of his office and the rules of maritime law the captain or master has charge of the ship and of the selection and employment of the crew, and it was his duty, and not that of the owners, to see that a competent and duly qualified officer was in actual charge of the steamer when not on the high seas. It is not alleged that the captain himself and the first mate were not regularly licensed pilots. They usually are such on all seagoing steamers; and in the absence of any allegation to the contrary, it will be presumed that they were so licensed.

In re Meyers et al, 74 Fed. Rep., 881, 891.

Section 4401, Revised Statutes of the United States, provides that every coastwise seagoing steam vessel shall "be under the control and direction of pilots licensed by the inspector of steamboats." Section 4443 provides: "Where the master or mate is also pilot of the vessel he shall not be required to hold two licenses to perform

such duties, but the license issued shall state on its face that he is authorized to act in such double capacity." Upon these provisions of the statute it is argued by respondents that Captain Lucas was incompetent, because it was not affirmatively shown that he was a licensed pilot or that a licensed pilot was in charge of the vessel. The facts are that no evidence whatever was given by either party upon this point. Captain Lucas was a witness for the respondents. No question was asked as to whether he was a licensed pilot. Upon these facts the court will be justified in presuming that he was a licensed pilot. In Butler *v.* Steamship Co. (130 U. S., 528, 554; 9 Sup. Ct., 612) the court held that in the absence of any allegations to the contrary it will be presumed, in a limited liability case in admiralty, that the captain and the first mate of a seagoing coastwise steamer are licensed pilots. The presumption is that the law in this respect was complied with, and the burden is cast upon the respondents to prove to the contrary; and, not having offered any evidence upon the subject, they can not claim that Captain Lucas was not a licensed pilot.

While these cases above cited refer to section 4401 of the Revised Statutes, the principle of the cases relative to the law of presumption would seem to be applicable with equal force to the case at bar. Section 4443 contemplates that a master may act as a pilot of his own vessel and does not

impose upon him the burden of obtaining two licenses to perform such duties, but provides that the license issued shall state upon its face that he is authorized to act in such double capacity. Captain McAvoy was acting in such double capacity, as shown by the evidence. It will, therefore, be presumed that he had the lawful and legal right to so act and that he held a license both as a master and as a pilot.

Not only does this strong presumption arise that Captain McAvoy held a license as a first-class pilot, but as a matter of fact he was so licensed in the month of September, 1897. Section 4411 of the Revised Statutes requires the board of supervising inspectors to establish such regulations as may be necessary to make known in a proper manner to local inspectors the names of all persons licensed as masters, mates, engineers, and pilots. Under authority contained in that section the Treasury Department of the Government for many years prior to 1903 published annual reports containing lists of masters, mates, engineers, and pilots of merchant, steam, and other motor vessels during each year ending on the 31st of December.

That publication for the year ending December 31, 1897, gives the name of *John McAvoy* as a licensed *master and pilot* and shows that a license was issued to him as such master and pilot on the 17th day of September, 1897, the number of his license being 6832. Such license was issued in the ninth supervising local district at Buffalo,

N. Y., and was good for a period of five years unless sooner revoked. These publications and reports of the Treasury Department for more than six years prior to the 1st day of January, 1902, do not give the name of any other John McAvoy who was *licensed in such dual capacity, to wit, as a master and pilot.*

We have taken the trouble to go into this matter at length for the sole purpose of showing to this court that the very exacting rule of high order of ability in a pilot as announced by Mr. Justice Miller in *Atlee* v. *Packet Company*, *supra*, should be applied in determining whether the conduct of Captain McAvoy in failing to inform himself as to the conditions at the entrance of Agate Bay before attempting to enter it was consistent with his duty as a prudent and careful mariner.

II.

THE GOVERNMENT WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

It will, of course, be conceded that the Government had the right to construct and maintain this extension to the breakwater at the entrance of Agate Bay, and that the officers of the War Department and the Government contractor were lawfully engaged in the prosecution of this improvement. It is contended, however, that the officers under whose supervision this breakwater was being constructed failed and neglected to give sufficient warning to mariners navigating the Great

Lakes as to the existence of this obstruction, and particularly in failing and neglecting to maintain a red light in lieu of a white light on the southwesterly end of the improvement; that such negligence on the part of the officers and agents of the Government contributed to the injury complained of, and for that reason the Government is not entitled to a judgment in this lawsuit. Let us again refer to the record for the purpose of ascertaining precisely what precautions were taken by the officers of the Government to advise and warn mariners of danger upon entering this harbor.

As early as July, 1899, a pamphlet was issued from the Hydrographic Office of the Navy Department entitled "Notice to Mariners" (Plaintiff's Exhibit B), wherein it was stated that the Government proposed to construct, during the ensuing year, this very improvement, of which Captain McAvoy had no knowledge up to the time that the collision occurred. In the month of August, 1900, a similar notice was issued to mariners (Plaintiff's Exhibit C), warning masters of vessels of the existence of this improvement and cautioning them upon entering the harbor of Agate Bay, to give the old breakwater a berth of 300 feet and not to round the east breakwater close on board as formerly, on account of this danger. On the 1st day of April, 1901, nearly three months prior to the accident, a bulletin was issued and published (Government's Exhibit D), by the Chief of Engineers of the

United States Army at Washington, in which it was stated that vessels should keep 300 feet away from the outer end of the east breakwater. All of these bulletins, except the last, were mailed to Captain McAvoy at his Detroit address, but as he testified, he paid very little, if any, attention to them. In addition to this information, the Government issued and published a chart of Two Harbors on the opening of navigation in the year 1901, upon which chart was plainly outlined the improvement in controversy (Government's Exhibit A). We desire to point out, in passing, that Captain McAvoy failed to avail himself of any of this information.

In addition to the precautions thus specified, the contractor was required by the terms of his contract with the Government to maintain a white light on the outer extremity of the improvement during the progress of the work until it was finally inspected and accepted by the Government. The reasons assigned for maintaining a white light were (1) that a white light could be seen at a greater distance, and (2) that for many years it had been customary to maintain a white light on Government improvements on the Great Lakes, and that mariners were familiar with such practice. The Government produced a number of witnesses upon the trial who testified that it had been the custom for years to designate piers, breakwaters, and other improvements under proc-

ess of construction by a white light. The following are excerpts taken from such testimony:

Samuel Wetton, a Government witness, who had been employed by contractors as a carpenter on Government work and who was engaged in the work of the improvement of the east breakwater at the entrance to Agate Bay during the summer of 1901, testified as follows (Rec., pp. 32, 33):

> Q. How many different improvements and different works upon the lake have you been engaged in the last ten or fifteen years?
>
> A. I do not know; I could count them up, though.
>
> Q. About how many?
>
> A. Twelve to fourteen different ones.
>
> Q. Do you know what the character of the light was that is used as a warning or danger signal upon these works you have been engaged in?
>
> A. Yes, sir.
>
> * * * * *
>
> Q. You may state what it was.
>
> A. When I stated twelve or fourteen, I didn't mean Government jobs.
>
> Q. You mean Government jobs?
>
> A. I think I was on about nine Government jobs; maybe ten would be right. I have not always had charge of these works; I have worked on them.
>
> Q. Well, what is the nature of the light?
>
> A. It has always been a clear light.
>
> Q. It has always been a clear light?
>
> A. It has always been a clear light; yes, sir.

John Krey, a Government witness, and an assistant engineer in the United States Army, who was in immediate charge of the construction of the new breakwater with which the steamer *Shenandoah* collided, testified (Rec., pp. 38, 39), as follows concerning his interview with Captain McAvoy on the morning after the accident and the character of lights maintained on Government improvements:

> Q. You saw Captain McAvoy the next day?
>
> A. I saw Captain McAvoy the next morning.
>
> Q. What conversation did you have with him about the cause of the accident?
>
> A. Well, sir, I boarded his vessel after I had ascertained to my own satisfaction that his boat had done the damage; I entered his cabin with two witnesses I took along with me, Mr. Wetton and Mr. Powell. I simply said, "Good day, Captain, I believe you ran into the breakwater last night," and he said, "Yes, I did." I asked him if he had any excuse to offer, and he said no, he had none. The only excuse he had to offer was he was not aware of the improvement. He said it was blowing pretty fresh from the northeast and he mistook the white light. He said he saw the white light and mistook it for the light of a vessel dragging her anchor. He said he did; that is all I said.
>
> Q. You were the assistant engineer?
>
> A. Yes, sir.

Q. What was your duty with regard to these cribs when they were completed?

A. Well, I superintended them.

Q. How long have you been engaged in superintending or interested in the improvements and Government works upon Lake Superior, or upon the Great Lakes, the northern lakes?

A. For six years.

Q. During that time do you know what kind of lights the Government officers or the contractors—I mean Government officers—put out as signals for mariners upon those works that are in process of construction?

A. Yes, sir.

Q. What kind of a light do they put out?

A. *White lights.*

Q. Did you ever see, in the whole course of your work, any other light than a white light upon Government work in the process of construction upon the Great Lakes?

A. No, sir; I don't remember.

Capt. David D. Gaillard, a Government witness and a captain in the Corps of Engineers of the United States Army, in charge of the works of river and harbor improvements on the American shores of Lake Superior during the year 1901, testified as follows regarding the lights used on pier and breakwater work under his supervision and control.

Q. What works or improvements were made in those harbors during the time you were stationed at Duluth?

A. At Grand Marais, Minn., at Agate

Bay, Minnesota, Duluth-Superior Harbor, and at the Portage Lake Canal.

Q. What was the character of the improvements made?

A. It was a breakwater construction at Grand Marais, Minn., and at Agate Bay, Minnesota, dredging and pier work in Duluth-Superior Harbor, and breakwater constructions and dredging at Portage Lake Canal.

Q. You are not a sailor yourself, and never have been?

A. I do not claim to be a sailor.

Q. Captain, state what kind of a light was displayed upon this new work that you have described having been performed during the time you were located here at Duluth.

A. In each of these four cases the light was a *white light*.

(Rec., pp. 51, 52.)

A. R. Porter, a Government witness, engaged in the business of contractor on Government work and who had worked on the breakwaters at Two Harbors, testified as follows concerning the lights used on the work (Rec., p. 71):

Q. Did you display any lights upon this work while it was under construction?

A. Yes, sir.

Q. What kind of a light?

A. A *white light*.

Q. For what purpose did you display that light?

A. I suppose it was to notify vessels that we were working there, and that the piers were under construction.

Maj. Walter L. Fisk, a Government witness, stationed at Detroit, Mich., who had charge of the survey of the northern and northwestern lakes during the year 1901, testified as follows concerning the lights placed upon the work under construction in the harbors upon Lake Superior (Rec., p. 75):

> Q. Do you know, Major, from your personal observation what the custom is as to the kinds of lights that are placed upon the work under construction in the harbors upon Lake Superior?
>
> A. I do.
>
> Q. What character of light is used customarily?
>
> A. Almost universally the light on construction work is *white*.
>
> Q. A *white* light.
>
> A. Yes, sir.
>
> Q. Do you know how long that light has been used for that purpose?
>
> A. *It has been used since I have known anything about river and harbor work, and that is some twenty years.*

Hugh Steele, a Government witness, and a contractor on harbor work for the Government, testified as follows concerning the lights displayed on work under construction (Rec., p. 78):

> Q. Now, Mr. Steele, I will ask you generally regarding this work whether you displayed a signal or warning light on the work during its progress of construction?

A. I have always, where we were near a channel. I have done some work away from a channel where there was no possible chance for a steamboat to strike it, but any time we were near a channel we would display a light for our own protection and according to the specifications.

Q. That is, whenever your work was out in a channel where a vessel was liable to sail you would display a light?

A. Yes, sir.

Q. What was the kind of light that you displayed?

A. A *white light.*

Q. Did you display any other kind of a light as a signal light?

A. No, sir.

F. B. Tims, a Government witness and a contractor on Government work, testified as follows concerning the lights used on work under construction (Rec., p. 79):

Q. You are a contractor?

A. Yes, sir.

Q. And have done contracting work for the Government?

A. Yes, sir.

Q. Building breakwaters?

A. Yes, sir.

Q. Where?

A. We built some breakwater at Ashland, Port Wing, Presqu'isle, and Marquette.

Q. Between what years was this work done?

A. It has all been done in the last five years.

Q. Did you use any lights on this work?

A. I did.

Q. What kind of a light?

A. A *white light.*

Q. Why did you use a white light?

A. More from custom than anything else I know of.

(Cases on the question of the effect of custom and usage: *The City of Washington*, 92 U. S., 31; *Adams* v. *Otterback*, 15 How., 539; *The Alaska*, 33 Fed. Rep., 107.)

With this testimony before the court and jury can it be said as a matter of law that the Government was guilty of contributory negligence and that the trial court should have directed the jury to return a verdict in favor of the defendant? The Government contends that every reasonable precaution was taken to warn mariners of the existence of this obstruction, and that under the facts as disclosed by this record the court below very properly submitted the question of contributory negligence to the jury under proper instructions, and that this court will not assume to reexamine the facts which have been tried by the jury under instructions correctly defining the legal rights of the parties.

The following cases establish beyond controversy that where contributory negligence is alleged by the defendant such question is to be determined by the jury, unless no recovery could be had upon any view of the case.

Railroad Company v. *Fraloff*, 100 *U. S.*, 24, 31.

This was a writ of error to review a judgment against the New York Central and Hudson River Railroad Company in an action by one Fraloff to recover the value of certain articles of wearing apparel alleged to have been taken from her trunk while she was a passenger upon the cars of the defendant company.

Mr. Justice Harlan, in delivering the opinion of the court, said:

> Looking at the whole scope and bearing of the charge, and interpreting what was said, as it must necessarily have been understood both by the court and jury, we do not perceive that any error was committed to the prejudice of the company, or of which it can complain. No error of law appearing upon the record, this court can not reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below under its general power to set aside the verdict. But that court, finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for new trial. Whether its action, in that particu-

lar, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. *Our authority does not extend to a reexamination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.* (*Parsons* v. *Bedford*, 3 Pet., 446; 21 How., 167; *Insurance Company* v. *Folsom*, 18 Wall., 249.)

***Kane* v. *Northern Central Railway Company*. 128 U. S., 91, 94.**

This was an action to recover damages for personal injuries sustained by the plaintiff in error in the discharge of his duties as an employee of the Northern Central Railway Company. It was based upon the negligence of the company in not providing suitable and safe appliances for the cars on which the plaintiff was assigned for duty. At the conclusion of the evidence introduced in his behalf the court directed a verdict for the railway company. The case was brought to this court upon a writ of error.

Mr. Justice Harlan, speaking for the court, said:

The circuit court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established that it would have been compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor. If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant

was proper. (*Phœnix Insurance Co.* v. *Doster*, 106 U. S., 30, 32; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S., 478, 482; *Anderson County* v. *Beal*, 113 U. S., 227, 241; *Goodlet* v. *Louisville & Nashville Railroad*, 122 U. S., 391, 411.)

But we are of opinion that the question of contributory negligence should have been submitted to the jury. It can not be said that the plaintiff was guilty of contributory negligence in staying upon the train, in the capacity of brakeman, after observing that a step was missing from one of the cars over which he might pass while discharging his duties. An employee upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily. Besides, the danger arising from the defective car was not so imminent as to subject him to the charge of recklessness in remaining at his post under the conductor's assurance that the car should be removed from the train when it reached the coal yard or junction, if, upon examining his manifests, he found that it did not contain perishable freight. (*Hough* v. *Railroad Co.*, 100 U. S., 224; *District of Columbia* v. *McElligott*, 117 U. S., 621, 631.)

***Dunlap* v. *Northeastern Railroad Company*, 130 U. S., 649, 652.**

This was an action on the case brought by Dunlap against the Northeastern Railroad Company to recover for injuries received, by reason of a train

belonging to the company leaving the track, while Dunlap was acting as engineer. The Circuit Court directed the jury to return a verdict for the railroad company. The case was appealed to this court.

Mr. Chief Justice Fuller, in delivering the opinion, said:

> The Circuit Court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish. (*Kane* v. *Northern Central Railway*, 128 U. S., 91; *Jones* v. *East Tennessee, Virginia & Georgia Railroad Co.*, 128 U. S., 443.)

Richmond & Danville Railroad Co., v. Powers, 149 U. S., 43, 44, 47.

This was an action brought to recover damages for injuries sustained by being run over by a train belonging to the railroad company, which resulted in a verdict in favor of the plaintiff. The case was brought to this court by the railroad company on a writ of error.

Mr. Justice Brewer, in delivering the opinion of the court, said:

> The only error assigned is in the refusal of the court to instruct the jury as requested, substantially that the deceased was guilty of such contributory negligence as to prevent a recovery. It is well settled that where there is uncertainty as to the existence of

either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. (*Railroad Co.* v. *Stout*, 17 Wall., 657; *Washington & Georgetown Railroad* v. *McDade*, 135 U. S., 554; *Delaware & Lackawanna Railroad* v. *Converse*, 139 U. S., 469.)

* * * * *

But, of course, all conflict in the testimony was settled by the jury, and could not be determined by the court, and unless it were affirmatively shown that the deceased, when he left the car, and started toward the eating house, knew that he was walking along a track, and that there was danger from another train, and with such knowledge neither looked nor took precautions to satisfy himself whether there was present danger therefrom, it surely can not be held that there was, as a matter of law, contributory negligence on his part.

***Alaska Steamship Company* v. *Collins*, 127 Fed. Rep., 937, 940.**

This was an action to recover damages for alleged injury to a wharf owned by the defendant in error, caused by the negligence of the steamer *Dirigo*, owned by the plaintiff in error. The case was tried before a jury, and resulted in a verdict for the plaintiff in the court below. The steamship company appealed the case to the Circuit Court of

Appeals for the Ninth Circuit. District Judge Hawley, in delivering the opinion of that court, said:

> The conflict raised by the testimony was a matter which the court properly submitted to the jury. The general rule is well settled that the plaintiff is entitled to have the question submitted to the jury unless no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish. (*Kane* v. *Northern Central Ry. Co.* 128 U. S., 91, 9, Sup. Ct. 16, 32 L. ed., 339; *Dunlap* v. *Northeastern R. Co.*, 130 U. S., 649, 652, 9 Sup. Ct. 647, 32 L. ed., 1058; *L. & N. R. Co.* v. *Woodson*, 134 U. S., 614, 621, 10 Sup. Ct. 628, 33 L. ed., 1032; *Washington Railroad Co.* v. *McDade*, 135 U. S., 554, 571, 10 Sup. Ct. 1044, 34 L. ed., 235.)

***Chicago Great Western Railway Company* v. *Price*, 97 Fed. Rep., 423, 428.**

That was an action brought by the administratrix of one Price to recover for injuries sustained by the intestate, and which resulted in his death while an employee of the company. The case was tried and a judgment rendered against the railway company for $3,500, whereupon the company took the case upon a writ of error to the Circuit Court of Appeals for the Eighth Circuit.

Circuit Judge Sanborn, in delivering the opinion of the court, said:

> But it is equally well settled that it is only when the evidence leaves the material facts admitted or undisputed, and only when these

facts are such that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury. If the evidence relative to material facts is contradictory, or if, from the admitted or established facts, the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury. (*Railway Co.* v. *Jarvi*, 10 U. S. App., 439, 451, 3 C. C. A., 433, 438, and 53 Fed., 65, 70; *Fuel Co.* v. *Danielson*, 12 U. S. App., 688, 696, 6 C. C. A., 636, 640, and 57 Fed., 915, 920; *Drake* v. *Stewart*, 40 U. S. App., 173, 178, 22 C. C. A., 104, 107, and 76 Fed., 140, 143; *Railway Co.* v. *Ives*, 144 U. S., 408, 417, 12 Sup. Ct., 679; *Railroad Co.* v. *Converse*, 139 U. S., 469, 11 Sup. Ct., 569; *Railroad Co.* v. *Pollard*, 22 Wall., 341.)

Cases cited by Counsel for Plaintiff in Error, in Support of their Contention that the Government was Guilty of Contributory Negligence, Referred to and Distinguished.

In support of their contention that the Government was guilty of contributory negligence counsel for the plaintiff in error cite a number of cases in their brief. From a careful examination of these cases it appears that there are only three cases cited in which there was not some law specifying the character of the light which should be displayed and where it should be located. The three cases referred to are clearly distinguishable from the case at bar.

Casement v. *Brown*,
148 U. S., 615.

This was an action to recover the value of certain barges destroyed by reason of a collision with certain piers constructed for a bridge over the Ohio River in West Virginia. The facts were that one of the piers was submerged by high water and the buoy that had been kept upon that pier during the day time had been washed away. The contractors had knowledge of this fact, yet no attempt was made to replace it, although they had ample time to do so before the collision occurred. It did not appear that they took any other precaution or made any attempt to notify mariners of the existence of the submerged pier. This court held under the facts in that case that the defendants were liable for the injuries which were caused by their own negligence.

Harrison v. *Hughes et al.*,
110 Fed. Rep., 545.

This case was a libel in admiralty by the master of the British steamship *Glenochil* against Hughes Brothers & Bangs to recover damages for injuries sustained to that vessel as a result of a collision with the new breakwater off Lewes, near the mouth of Delaware Bay, which occurred at about 1 o'clock in the morning on November 30, 1897. At the time of the accident the new breakwater, which was an extension of the old breakwater, was in course of construction by the defendants under a contract with the Government. In this case, as in the case at bar, the contract provided that a

light should be erected and maintained by the contractors on the breakwater while in process of construction. It appeared from the evidence that the light which was required to be maintained by the contractors at the end of the new breakwater was not burning at the time of the accident, it having been extinguished by high winds. It further appeared that the contractors knew that this had happened on prior occasions, and that they took no steps to remedy such defect. At the time of the accident, therefore, no light whatever was burning at the end of the extension to the breakwater as a warning to mariners. The court held that the contractors were guilty of negligence and that the pilot was also guilty of negligence, and thereupon apportioned the damages equally between the parties.

United States v. *Charles G. Dunn & Co.*,
124 Fed. Rep., 705, 707.

This was an action at law brought by the United States to recover damages to a Government pier in the Delaware River as a result of a collision with the pier by a steam vessel. The pier was 50 feet wide by 250 feet long, its outer end being protected from the ice by an ice break 75 feet in length. The pier was lighted at night by a white light. The night was dark and the only light that was displayed on the pier could not be seen from the position to which the vessel had been forced. The pier was probably not more than 200 or 300 yards away when its outlines were seen and the situation,

as the court said, evidently presented nothing but a choice of two evils, to wit, a collision with the tug or with the pier. Under such circumstances the court held that the prompt decision of the pilot was correct, as nothing else could have been prudently done. Judge McPherson said:

> It must be presumed that, as a licensed branch pilot, he knew that he was in the neighborhood of the quarantine station, and that the pier was an obstacle that must be avoided. But I do not think he was bound, at his peril, to know in the dark within a few yards precisely where a relatively small, invisible, and *unlighted* object was to be found. If he had had the aid that is now afforded by the light on the southern end of the pier, and had thus been warned a little sooner, so that precautions might have been taken—even five or ten minutes earlier—I have little doubt that the collision would have been avoided. As it was, he found himself in a position of peril without fault of his own and was forced to choose one of two dangers. If he made an error of judgment under such circumstances I do not think it should be reckoned as actionable negligence.

We respectfully submit that in no one of these cases are the facts analogous to the case at bar, and that the judgment of the Circuit Court of Appeals for the Eighth Circuit should be affirmed.

MILTON D. PURDY,
Assistant to the Attorney-General.

O